No. 16-15172

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CORNELE A. OVERSTREET, Regional Director of the Twenty-Eighth Region of the National Labor Relations Board, for and on behalf of the National Labor Relations Board,

Petitioner–Appellee,

v.

SHAMROCK FOODS COMPANY,

Respondent–Appellant.

On Appeal from the United States District Court
for the District of Arizona
No. 2:15-cv-01785-DJH
The Honorable Diane J. Humetewa

Appellant's Reply Brief

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Introduction and Summary of Argument

Shamrock Foods Company has every right to explain to its employees why it believes that union representation would be bad for the company's business and its employees. Yet that protected speech was the cornerstone of the district court's decision finding that Shamrock had unlawfully "interfered with employees' unionization rights." *E.g.*, ER7 (citing Shamrock officials' "very negative view[] of unions" and airing of an "anti-union video" as supporting unfair labor charge); ER10 (citing official's view that a union is "not good for us here at Shamrock"). Shamrock's expression of its opposition to union representation remains the cornerstone of the Regional Director's case against it in this Court, providing the essential "context" that he asserts transforms dozens of instances of innocuous conduct—impromptu conversations, offhand statements, small talk, and the like—into violations of law justifying extraordinary relief. *See, e.g.*, RD Br. at 27–28 (asserting Shamrock's speech was "threatening and coercive," based on "context"); *id*. at 32–33 (same, concerning break-room conversation); *id*. at 38 (asserting that discharge must have been unlawful in light of Shamrock's "anti-union" views). In this way, the Regional Director constructs a house of cards: each strained characterization of innocuous conduct as unlawful interference is supported by every other one, altogether comprising (in the Director's words) "a relentless barrage of…propaganda." *Id*. at 24.

But, now that the Regional Director is forced to defend the district court's finding that he is likely to succeed on every single charge, that house of

cards is tumbling down. On appeal, the Director abandons any advocacy of nearly half of his charges against Shamrock, including all of the six separate charges that Shamrock, through its speech, unlawfully created the impression of surveillance among employees. The Director's decision to abandon these charges reflects the trumped-up nature of his case against Shamrock and the district court's woefully insufficient review of the evidence supporting those and the other charges. Between the abandoned charges, the district court's reliance on speech expressing Shamrock's views that the Director has never challenged as unlawful, and the district court's acceptance of charges rejected out of hand by the Administrative Law Judge, the district court's blanket ruling against Shamrock on every single charge is unsustainable and must be reversed.

The Director's cursory defense of those charges he hasn't abandoned underscores the weakness of his case for injunctive relief and the overreaching of his legal theories. The sole "threat" charge that remains concerns a Shamrock official's speech about a labor union's interests sometimes being different than those of the workers it represents, not anything about what the company would or would not do in the future concerning benefits. There was no threat. The remaining claims of unlawful "interrogation" do not involve any interrogation at all, much less any threat of reprisal. The Director's argument regarding Shamrock's allegedly coercive instances of soliciting employee complaints omits any discussion of the evidence, because the evidence does not show that Shamrock promised anything to coerce employees into opposing the Union.

And the Director's claim that an employer cannot invite its employees to report unlawful conduct occurring in the workplace is absurd and supported by no precedent. What ties these charges together is the Director's insistence, in every instance, that Shamrock's expressed opposition to union representation transforms ordinary workplace speech into unlawful coercion and interference.

Finally, the Director makes no attempt to justify the enormous breadth of the multifaceted injunction entered by the district court and is unable to support the need for injunctive relief at all, in light of the Union's charge that it had collected union representation cards from a majority of employees in its preferred bargaining unit. That charge undermines any claim that a Section 10(j) injunction is called for to provide relief that would be unavailable in a future decision by the Board.

In sum, the district court found that injunctive relief must be appropriate in this case because the Regional Director requested it. But the federal courts are not in the business of rubberstamping federal agencies' petitions. The district court having unduly deferred to the Regional Director on every element of this case—to the point that it found in the Director's favor regarding conduct he never charged and charges he refuses to defend in this Court—the decision below should be reversed and the injunction vacated.

Argument

I. The Regional Director Was Not Entitled to Across-the-Board Deference on All Elements of the Preliminary Injunction Standard

It is understandable that the Regional Director would seek to defend the district court's mistaken impression that, for the Regional Director to obtain a Section 10(j) injunction, all he need do is ask for one. According to the Director, merely filing an injunction petition entitles him to almost absolute deference on the merits (at 20–21), on the existence of irreparable harm (at 23), and on the balance of harms and public interest (at 23). But that is not the law, particularly in cases like this one where the Director's request for relief runs "at least some risk" of enjoining constitutionally protected speech and so must clear "a higher bar than usual" by making "particularly strong showings of likelihood of success and irreparable harm." *McDermott v. Ampersand Publ'g, LLC*, 593 F.3d 950, 957–58 (9th Cir. 2010).

A. The Regional Director's contention (at 40) that *Overstreet*'s heightened standard does not apply here is contrary to both *Overstreet* and *McDermott*, as well as basic principles of constitutional avoidance. Those decisions hold that the heightened standard applies where "there is at least some risk that constitutionally protected speech will be enjoined." *Overstreet v. United Bhd. of Carpenters & Joiners of Am.*, 409 F.3d 1199, 1207–08, 1208 n.13 (9th Cir. 2005); *McDermott*, 593 F.3d at 958 (applying "at least some risk" test). That risk is unambiguously presented by an injunction that a federal agency sought for the express purpose of "sending a message," ER6, that the district court expressly

premised on Shamrock's speech opposing union representation, *e.g.*, ER7, ER10, and that bars Shamrock from engaging in protected speech going forward, ER16–17. *See generally* Shamrock Br. at 24–30 (addressing merits of First Amendment claims). As *Overstreet* itself recognized, such speech "designed to convince others not to engage in behavior regarded as detrimental to one's own interest, or to the public interest, is fully protected speech." 409 F.3d at 1211 (quotation marks omitted). *See also NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969).

Overstreet rejects the Regional Director's argument (at 43–45) that the Court should definitively assess the extent of Shamrock's First Amendment rights at the outset, with deference to the Board's expertise, prior to applying the heightened standard. The proper inquiry, *Overstreet* explained, is not "whether the First Amendment *does* protect the [speech at issue], or even whether it probably does." 409 F.3d at 1209. "Instead, it is sufficient to recognize that the argument is a plausible…one." *Id*. at 1211. *See also id.* at 1208 ("If [First Amendment argument] is colorable…then the deference courts owe to the Board with regard to the interpretation of the NLRA is at its nadir."); *McDermott*, 593 F.3d at 958 (holding that there is "at least some risk" of First Amendment violation, thereby triggering heightened standard, where argument is "plausible"). This approach is not, as the Director appears to regard it, an incidental feature of *Overstreet*, but central to how courts undertake "constitutional avoidance" in interpreting and applying vague language in the NLRA. 409 F.3d at 1208–09 (discussing *Edward J. DeBartolo Corp. v. Fla. Gulf Coast*

Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988)). *See also BE & K Constr. Co. v. NLRB*, 536 U.S. 516, 535–36 (2002) (applying same avoidance approach with respect to Section 8(a)(1), the main provision at issue in this case).

Also contrary to the Director's argumentation (at 43), that task is one "committed *de novo* to the courts," without deference to the agency, *Overstreet*, 409 F.3d at 1209, as the Supreme Court has held with respect to the same statutory scheme at issue here. *Edward J. DeBartolo Corp.*, 485 U.S. at 574–75; *BE & K*, 536 U.S. at 535–36 (refusing to defer to Board with respect to same statutory provision at issue here). That there may be "a vast universe of Board law" reflecting the Board's pinched view of employers' First Amendment rights, RD Br. at 44, is irrelevant.

The district court's refusal to apply *Overstreet*'s heightened standard and decision instead to accord the Regional Director's views "special deference," ER6–7, constitutes abuse of discretion, warranting vacatur of the injunction and remand for application of the proper standard.

B. The Regional Director's view that he is entitled to almost complete deference on the equities of injunctive relief cannot be squared with *Winter v. Nat. Res. Def. Council*, 555 U.S. 7 (2008), and this Court's precedents interpreting and applying it. *See* Shamrock Br. at 18–23.

As an initial matter, *Overstreet* sets forth a "Heightened Equitable Relief Standard" that requires the Director to "establish [a] particularly strong showing[] of…irreparable harm." *McDermott*, 593 F.3d at 958. Contrary to the Di-

rector's contention (at 22–23), the district court may not simply presume irreparable harm.

Whether or not *Overstreet*'s standard applies, the district court's presumption of irreparable harm and the necessity of injunction with respect to every charge and every aspect of the requested injunction was still in error. *See* Shamrock Br. at 20–22. As discussed further below, *see infra* § III, the Regional Director makes no attempt to justify the broad scope of the injunction in all of its particulars. But this Court has recognized that *Winter* prohibits "an all-or-nothing approach" with respect to injunctive relief. *Sierra Forest Legacy v. Rey*, 577 F.3d 1015, 1022 (9th Cir. 2009). Instead, a district court must consider the necessity of each element of injunctive relief, *id.*, and, in a Section 10(j) action, require a showing as to each that failure to accord relief would "'render meaningless the Board's remedial authority.'" *Small v. Operative Plasterers' & Cement Masons' Int'l Ass'n Local 200, AFL-CIO*, 611 F.3d 483, 494 (9th Cir. 2010) (quoting *Miller ex rel. NLRB v. Cal. Pac. Med. Ctr.*, 19 F.3d 449, 460 (9th Cir. 1994) (en banc))). The Director identifies no basis to excuse his failure to carry that burden.

Likewise, the Regional Director identifies no valid basis to excuse the district court's complete failure to consider Shamrock's equities and does not even attempt to distinguish cases holding that a district court's failure to balance the interests of the parties constitutes reversible error. *See* Shamrock Br. at 23–24.

II. The Board Is Not Likely To Succeed on the Merits of Its Cobbled-Together Case Brought To Punish and Restrain Shamrock's Anti-Union Speech

A. Section 8(c) and the First Amendment Shield Shamrock's Speech to Its Employees from Board Sanction

1. Although he urges this Court to uphold the district court injunction, the Regional Director does not attempt to defend that court's reliance on Shamrock's speech opposing collective bargaining to find against Shamrock on the merits. The district court found that the Director was likely to succeed on the merits of all of his unfair labor practice charges because Shamrock officials had expressed "very negative views of unions," aired "an anti-union video," and stated "that a union 'is not good for us here at Shamrock.'" ER 7, 10. That court's complete response to Shamrock's argument that this speech was fully protected by Section 8(c) and the First Amendment was to assert that it was "not persuaded." ER5 n.1, 8. The Director does not even go that far, refusing to engage Shamrock's arguments regarding its rights and flatly asserting (at 17) that the First Amendment has no potential application to "[e]mployer speech in the context of a union organizing campaign."

The Supreme Court has held the opposite, expressly "recognizing the First Amendment right of employers to engage in noncoercive speech about unionization." *Chamber of Commerce v. Brown*, 554 U.S. 60, 67 (2008) (citing *Thomas v. Collins*, 323 U.S. 516, 537–38 (1945)). The Regional Director does not contend that Shamrock's anti-union speech that the district court cited and held likely violated the NLRA was coercive or anything of the sort—such an

argument would be untenable. His refusal to defend the district court's indefensible assessment of the merits warrants reversal.

2. On appeal, the Regional Director abandons three of the four charges of alleged unlawful "threats" that the district court found were likely to succeed on the merits. *See* RD Br. at 26–28 (addressing alleged "threats"). It is easy to understand why: an employer's routine interactions with employees cannot be punished because the NLRA does not "*clearly* prohibit[] the [challenged] conduct." *Overstreet*, 409 F.3d at 1209–10 (quoting *BE & K*, 536 U.S. at 535–36). *See* Shamrock Br. at 26–27 (addressing the three abandoned charges).

The one alleged "threat" that the Director does attempt to defend on appeal (at 26–27) also concerns speech that is not clearly prohibited by the Act: Engdahl's comments to employees that they could end up with less in terms of wages and benefits as a result of collective bargaining. *See* Shamrock Br. at 25–26. Engdahl never said that Shamrock would act to take away existing benefits, only that "[i]t's all up to collective bargaining at that point in time" and that a labor union cannot "guaranty you anything" concerning the results of collective bargaining. SER68. That is not only a true statement of the law, *see* 29 U.S.C. § 158(d), but the kind of statement that this Court has found to be "well within the employer's 'protected speech' under s 8(c) of the Act," to the point that it denied enforcement of the Board's order to the contrary. *NLRB v. Gen. Tel. Directory Co.*, 602 F.2d 912, 916 (9th Cir. 1979). In fact, as Engdahl repeated throughout his remarks, his point was that the Union is a "business" with its own interests and so may not always look out for employees' own in-

terests, not that Shamrock would undertake any kind of reprisal. *See* SER62–63, 65, 68–69. His expression of that opinion is protected speech, not the kind of "veiled threat[] on the part of the employer to visit retaliatory consequences upon the employees in the event that the union prevails" that may be sanctioned under the NLRA. *NLRB v. Lenkurt Elec. Co.*, 438 F.2d 1102, 1105 (9th Cir. 1971).

The Director's argument (at 27) that *General Telephone* was different because the court found the statements there to be "a prediction of a possible economic consequence," outside of the employer's control, misstates the case. The court actually rejected the argument that the Director raises here, that the context of the labor dispute showed that the speech amounted to "'threats of reprisal' and 'threats to restrict employee's benefits' should unionization become a reality." 602 F.2d at 917. Instead, it recognized that cases involving similar claims had featured actual threats, and that "[t]he mere fact of a statement's vagueness or obtuseness, even if intentional, does not warrant a necessary inference of threat or retaliation" sufficient to strip it of First Amendment protection. *Id*. at 918. The only way that this case is different from *General Telephone* is that Engdahl never made any prediction about what Shamrock would or would not do in the future concerning benefits—his focus, after all, was the Union and its interests, not Shamrock—rendering the charge here even more tenuous.

3. The Director defends (at 32–33) only three of his four charges of unlawful interrogation, abandoning the claim (which the district court accept-

ed) that a floor captain unlawfully interrogated Steve Phipps when, after running into Phipps by the time clock, the captain mentioned "rumors" about an organizing campaign and "asked [Phipps] if he knew anything" about it. *See* ER137–38, 161–62. The Regional Director's cursory discussion of the other "interrogation" claims reflects their lack of any basis in fact or law and underscores his overreaching in this case, to the point that his intended application of the Act in this case "directly collide[s] with the Constitution." *Rossmore House*, 269 NLRB 1176, 1177 (1984) (discussing employers' "right to ask noncoercive questions of their employees during [an organizing] campaign").

Those three instances of alleged "interrogations" involve speech that is not clearly prohibited by the Act and could not be, consistent with the Act's purposes and the First Amendment. First, the Director asserts that Thomas Wallace was subject to "unlawful interrogation" on January 28, but Wallace's own testimony shows that this event consisted, in its entirety, of a single casual question—asking what he "thought about the Union"—made during the supervisor's daily rounds after employees had viewed a video on union authorization cards. ER170–71. "[E]mployer questioning of employees regarding their concerted activities is not per se unlawful." *NLRB v. Silver Spur Casino*, 623 F.2d 571, 584 (9th Cir. 1980); *NLRB v. Hotel Conquistador, Inc.*, 398 F.2d 430, 434 (9th Cir. 1968) (refusing to enforce Board order on interrogation charge involving supervisor's question to employee as to whether employee "knew anything about" representation petition). The only thing that transforms this routine encounter into an illegal "interrogation," according to the Director (at

32), is Shamrock's expressed opposition to union representation—in other words, its speech.

Second, the Director asserts that Phipps was subject to "unlawful interrogation" when Safety Manager Joe Remblance ran into him and another employee in a common area, asked them "what [they] were talking about," and made "small talk" (which not even Phipps claims concerned the organizing campaign) with them for a few minutes. ER91. The Director never explains how this constitutes any kind of "interrogation" at all, and it is not apparent from the record or the Director's cited cases.

Third, the Director asserts that Sanitation Supervisor Karen Garzon unlawfully interrogated employees when she discarded several Union flyers Phipps had left with workers in the break room, was confronted by Phipps, and so asked the workers whether they wanted the flyers back. ER98, 202. Again, this does not appear to be an "interrogation" at all, much less one carrying a threat of reprisal. *Contrast with Great Chinese Am. Sewing Co. v. NLRB*, 578 F.2d 251, 253 (9th Cir. 1978) (describing a more typical interrogation charge, where employer threatened to withhold paychecks until employees disclosed union sympathies and surrendered union cards).

Interpreting the Act to reach such mundane interactions with employees not only raises serious constitutional questions, but also raises serious practical concerns, such as whether a supervisor can ask employees "What's up?" or engage in small talk without running the risk of liability. That is why courts have recognized that "[i]solated interrogation, free of coercive statements and absent

resort to systematic intimidation, does not constitute an unfair labor practice but falls within the free speech protection of the Act." *NLRB v. Century Broad. Corp.*, 419 F.2d 771, 780 (8th Cir. 1969). And that is why this Court has long held that, to constitute an unfair labor practice, "interrogation must be accompanied by threats of reprisal, force or by promises of benefit." *Conolon Corp. v. NLRB*, 431 F.2d 324, 330 (9th Cir. 1970). But in this case, there is no indication of interrogation at all, much less threats or force, only speech. The Act cannot and should not be read to extend so far.

4. The Regional Director omits any discussion of the details of Shamrock's allegedly coercive instances of soliciting employee complaints because the facts do not support his charges. *See* RD Br. at 30–31. As the Director's chief authority explains, "the mere solicitation of employee grievances prior to an election is not a per se violation," but "becomes an unfair labor practice when accompanied by either an implied or express promise that the grievances will be remedied and under circumstances giving rise to the inference that the remedy will only be provided if the union loses the election." *Idaho Falls Consol. Hosps., Inc. v. NLRB*, 731 F.2d 1384, 1386–87 (9th Cir. 1984). "An expressed willingness to listen to grievances is not sufficient to constitute a violation." *Id.* at 1387. The Court in that case declined to enforce the Board's order regarding charges of unlawful solicitation of grievances because, although the employer "expressed a willingness to listen to grievances," it could "find no evidence of [the employer's] promise to correct or resolve any grievances." *Id.* But as discussed in Shamrock's opening brief (at 27–28), all Sham-

rock did was express its willingness to listen to employee complaints, in the same way that it had through employee roundtables and its open-door policy for years, without making any particular promises. While claiming (at 31) that the "rare occurrence of these meetings and the unusual nature of soliciting feedback" supports its charges, the Director does not point to any promises (contingent or otherwise) or dispute the testimony of his primary witness, Phipps, that Shamrock had conducted "hundreds" of such meetings and that Phipps had repeatedly taken advantage of Shamrock's open-door policy to lodge complaints. *See* Shamrock Br. at 27 (discussing testimony at ER148–60).

5. The Regional Director's argument (at 33–34) that an employer cannot invite its employees to report unlawful conduct occurring in the workplace is ridiculous, unsupported by even Board precedent, and violative of the First Amendment.

Shamrock is not aware of any precedent—the Regional Director does not point to any—interpreting the Act to prohibit an employer from inviting its employees to report "unlawful" actions in the workplace. *See* ALJD 31 (acknowledging that no such precedent likely exists). That is the entirety of the invitation in CEO Kent McClelland's May 8 letter to employees: to "please promptly report" conduct at work that "violates the law through threats of violence or unlawful bullying." SER133. In other words, it asks them to help Shamrock in following the law. The public policy implications of the Director's interpretation are staggering: it would undermine enforcement of every other law on the books, as well as the maintenance of an orderly, safe, and

productive workplace. Because the Act does not clearly prohibit such speech, the Act cannot be interpreted to reach it. *See NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 502 (1979).

The Director also complains about the letter's statement that Shamrock will "refer [complaints with 'merit'] to law enforcement for prosecution to the fullest extent of the law if that is the right course of action." *Id*. But what else is a responsible employer supposed to do when it receives credible reports of "threats of violence" or other "unlawful" conduct in its workplace? Once again, the Board's representative is being "remarkably indifferent to the concerns and sensitivity which prompt many employers to adopt the sort of rule at issue here," including serious risks of civil liability for failing to address and report unlawful conduct. *Adtranz ABB Daimler-Benz Transp., N.A., Inc. v. NLRB*, 253 F.3d 19, 25–27 (D.C. Cir. 2001) (rejecting as "preposterous" Board position that employers may not prohibit "abusive or threatening language"). In addition, the Act does not, and cannot be interpreted to, abridge Shamrock's First Amendment right to petition government officials regarding unlawful conduct. *BE & K*, 536 U.S. at 533–36.

The other charge is equally meritless. It concerns Warehouse Operations Manager Ivan Vaivao's advice to floor workers about how to effectively respond to unwanted harassment by Union organizers: "Tell them to get out of my way if you don't want to be associated with. But if you don't say something, you're going to continue to be approached…. Tell them no, you won't be a part of it. Raise your hand, say, hey, man, this guy is bugging me, you

know." FER5–6. To begin with, contrary to the Director's characterization (at 33), this statement does not "direct[] employees to report Union activity." It does not direct them to do anything, but instead presents Vaivao's advice for how an employee uninterested in signing a union card could act to prevent further harassment. And even if taken as a direction, it does not appear to instruct employees to report anything to Shamrock at all, but to "say something" and speak out so as to deter future harassment.

In any instance, "it is not unlawful for an employer to ask employees to report threats," but an employer in so doing must balance the "equally important interests of protecting employees while not infringing upon their right to engage in union activities." *Bloomington-Normal Seating Co. v. NLRB*, 357 F.3d 692, 696 (7th Cir. 2004). Relevant considerations include (1) whether the policy is mandatory, (2) whether employees face discipline for failure to make reports, and (3) whether there is evidence "that the company believed any employees had been threatened or harassed by union representatives." *Id*. Any such "policy" here—recognizing that the charge involves an offhand remark at an employee meeting—does not require reporting or penalize employees for failure to make reports. And the record contains undisputed evidence (including from the very same meeting, *see* FER4) that Shamrock had received reports of its employees suffering harassment and bullying. In these respects, any "policy" propounded by Vaivao is very different from the more formal reporting policy, adopted without respect to reports of harassment, at issue in the Board's chief precedent. *See Bloomington-Normal Seating*, 357 F.3d at 694.

B. The Regional Director Abandons All But Three of the Ten "Surveillance" Charges the District Court Held Were Likely To Succeed on the Merits

The Regional Director abandons all six of the charges regarding statements that he alleged "created an impression among its employees that their union activities were under surveillance." ER41. Although he is right to do so, *see* Shamrock Br. at 32–35 (demonstrating lack of factual or legal basis for those charges), abandoning those charges only confirms the trumped-up nature of his case against Shamrock and the district court's failure to scrutinize the evidence in this case.

The Director does defend three instances of alleged surveillance (out of the four alleged in his petition[1]), none of which, taken individually or together, have merit or provide a basis for a Section 10(j) injunction.

To begin with, contrary to the Director's assertion (at 29), Shamrock did not "ignore[]" Safety Manager Joe Remblance's alleged "interrogation" and "surveillance" of Phipps and another employee. *See* Shamrock Br. at 29, 33–34. That event consisted, in its entirety and according to Phipps, of Remblance running into Phipps and the other worker during a break, asking them "what [they] were talking about," "talking small talk with [them]," and then chiding them to get back to work at the conclusion of their break. ER91–92, 147. This is simply not the kind of encounter that would lead employees to fear that

[1] The fourth involves the allegation that Manning, after Phipps had publicly announced his leadership of the organizing campaign, told "employees that [he] knew which employees announced they were organizing for the union." ER45.

"members of management are peering over their shoulders." *Flexsteel Indus.*, 311 NLRB 257, 257 (1993).

As for Floor Captain Art Manning's appearance at a restaurant where a Union meeting was being held, the facts undercut any claim that he was attempting to surveil Union supporters. As described in Shamrock's opening brief (at 31–32), if Manning's purpose was surveillance, he went about it in an unpromising way unlikely to result in actual information or intimidation. The ALJ discredited Manning's testimony that he had been invited to the meeting—in the same way that he had been invited to other off-site meetings—on the basis that Manning could not remember, months later, who had invited him and that he may have overheard word about the meeting—although there was no evidence on that point. *See* ALJD 21 & n.37. In light of the circumstantial evidence supporting Manning's account of events, the lack of evidence supporting the surmise adopted by the ALJ, and the lack of any showing that Manning (or anyone else) attempted similar "surveillance" of off-site meetings, the district court's acceptance of this claim was in error.

The Regional Director's final surveillance charge involves "Forklift Manager David Garcia rifling through [Lerma's] clipboard" that Lerma had left on his forklift. RD Br. at 11. In sworn testimony, Garcia explained that he picked up Lerma's clipboard simply to review the schedule of assignments for that evening, that he did not know (not being responsible for assigning forklifts to employees) that the forklift was assigned to Lerma, and that the clipboard was in plain view. FER10–12. He disputes the claim, based solely on Lerma's

say-so, that he told Lerma that he was searching for union cards. FER15. The Regional Director does not contend that the clipboard contained union cards or any other materials related to the organizing campaign—Lerma's affidavit suggests it did not, SER126—and there is no allegation that Shamrock supervisors have searched through employees' belongings for Union materials in any other instance. Even if Garcia was wrong to pick up the clipboard that Lerma had left out on his forklift, that conduct would not support the broad and intrusive injunction entered by the court below.

C. The Regional Director Identifies No Support for the District Court's Finding That Shamrock's Wage Increases Were Improper

The Regional Director misstates the law when he asserts (at 35) that "[p]romising and granting increased benefits after a union campaign commences squarely violates § 8(a)(1) of the Act." What the law actually prohibits is "conduct immediately favorable to employees which is undertaken with the express purpose of impinging upon their freedom of choice for or against unionization and is reasonably calculated to have that effect." *NLRB v. Exch. Parts Co.*, 375 U.S. 405, 409 (1964). While the timing of wage increases may establish a presumption of improper motivation during the extremely sensitive period in the run-up to a representation election, *id.*; *NLRB v. Stephen Dunn & Assocs.*, 241 F.3d 652, 666 (9th Cir. 2001); *Raley's, Inc. v. NLRB*, 703 F.2d 410, 414 (9th Cir. 1983), here there was no scheduled election, and the Director identifies no basis for the district court's implicit finding of Shamrock's im-

proper motivation—his only evidence is that the wage increases did, in fact, occur. *See* RD Br. at 35. Shamrock, by contrast, showed that the wage increases were not targeted at the same group of workers that the Union sought to organize, were not timed to interfere with any organizing activity, and reflected its economic realities. *See* Shamrock Br. at 36–37. In the absence of any evidence supporting this charge, the district court's finding that the Director is likely to succeed on it was clear error.

D. The Regional Director Identifies No Evidence That Shamrock Had Any Knowledge of Wallace's Minimal and Covert Union Activities

In addition to being moot, *see infra* § IV, the Regional Director's charge that Shamrock unlawfully discharged Thomas Wallace is meritless, given the lack of any evidence that Shamrock knew Wallace was engaged in Union activities. The Director says (at 38) that it is "patently absurd" that Shamrock was unaware of Wallace's activities, but Wallace's own testimony proves the point. According to Wallace, his Union-related activities consisted of: (1) signing a card at a February 1 meeting held outside of the workplace and (2) obtaining Union cards for two relatives. SER97–101. Wallace recounts, in detail, the measures he took to conceal his Union support and activities from possible discovery, *id.*, and testified that Shamrock "did not know which employees were involved with getting the union in or getting cards signed because all of us employees who were part of the organizing campaign did our best to be covert." SER101. The Director's contention (at 37) that "Wallace was an

open Union supporter" is false, and the lack of any evidence showing Shamrock's knowledge is fatal under the burden-shifting approach of *Wright Line*, 251 NLRB 1083, 1087 (1980) ("Initially, the employee must establish that the protected conduct was a 'substantial' or 'motivating' factor.").

Although that failure of proof is enough for Shamrock to prevail on this charge, Shamrock cannot leave unanswered the Director's incorrect assertion (at 38–39) that its explanation for Wallace's discharge—that he disrespectfully stormed out of a mandatory meeting being conducted by several of its senior executives—is pretextual. That was not only the explanation provided in testimony by Warehouse Operations Manager Ivan Vaivao, *see* ER114, but the same one provided in Shamrock's statement before the Administrative Law Judge, *see* ALDJ40 (Wallace "abruptly left the meeting without permission"), in testimony by Shamrock officials at the subsequent hearing, *see id*. ("he walked out of the meeting"; he was disciplined for "leaving the meeting"), and in its post-hearing brief, *id*. ("Wallace was discharged because he stormed out of [the] March 31 mandatory meeting.").

Finally, Wallace's limited Union activities are strong circumstantial evidence that he was not discharged for his Union support. As discussed above, by Wallace's own telling, he was barely involved in the organizing campaign. The campaign's leader, Phipps, testified that Wallace had no prominent role. ER93. Put simply, Wallace is not the kind of union activist an employer would rationally single out for the purpose of deterring union activities.

E. Shamrock's Counseling Meeting with Lerma Was Not Unlawful Discipline

The Regional Director argues (at 39–40) that Shamrock Vice President of Operations Mark Engdahl disciplined employee Mario Lerma due to Lerma's organizing activities, but simply ignores undisputed evidence that Engdahl acted in response to reports of "heckling," "insulting," and "harass[ment]," including one employee "having pens thrown at him because he wouldn't sign a card." ER185, 188, 268. The Director claims (at 39) that Engdahl's improper motivation is supported by circumstantial evidence, including Lerma's active Union support, Shamrock's opposition to Union representation, and the lack of any further investigation into the reported harassment. But this Court has overturned even final Board decisions finding unlawful discipline when supported only by such circumstantial evidence—in particular an employer's "anti-union" views. *NLRB v. Best Prods. Co., Inc.*, 618 F.2d 70, 73 (9th Cir. 1980). The Director cannot rely on Shamrock's protected speech to transform a mundane counseling session with an employee accused of harassment into retaliatory discipline, particularly when Engdahl repeatedly made clear to Lerma that he was "entitled" to continue his advocacy on union representation. ER269, 271.

III. The Equities Do Not Support Injunction

A. The injunction requested by the Regional Director and entered by the district court imposes more than a dozen separate obligations on Shamrock, ER16–19, and yet the Director makes no attempt to justify nearly all of

them. *See* RD Br. at 46–52. Instead, the Director echoes (at 46–49) the district court's view that "Wallace's discharge…alone" supports every aspect of the injunction, without ever explaining how that alleged violation could possibly justify restricting Shamrock's speech regarding Union representation, barring Shamrock from "soliciting employee complaints and grievances," or any of the injunction's many other terms unrelated to Wallace's termination. ER17. In the absence of any such argumentation, much less an evidentiary showing and findings by the district court, the injunction cannot stand in anything like its current form, if at all.

B. The Director also offers no justification for the district court's complete disregard of the Union's charge, filed under penalty of perjury, that it had collected union representation cards from a majority of employees in its preferred bargaining unit. ER285. The relevance of that admission cannot be overstated. As the Regional Director explains (at 49), the relevant irreparable injury in a Section 10(j) action is "erosion of employee support for the Union and harm to the Board's remedial authority." Accordingly, the Union's affirmative claim that Shamrock's employees were vigorously exercising their right to support the Union, to the point that the Union could claim majority support, completely undermines the contention that the extraordinary remedy of a preliminary injunction is necessary to protect employees' right to show such support or the Board's remedial authority. The Regional Director's only response (at 49) is to assert that the Union's charge does not "constitute proof of anything" and says nothing about the "extent, timing, or trend of Union support."

But that's nonsense: as to extent, the charge asserts majority support; as to timing, it was filed on September 16, in the wake of the alleged violations that provide the basis for the injunction here; and as to trend, it indicates that the Union had gained significant support subsequent to those alleged violations, to the point that it had reached the goal of its organizing campaign, majority support.

Given the purpose of Section 10(j) injunctions, it is difficult to imagine evidence that could be more probative on the issue of irreparable injury than a Union's assertion of majority support immediately following alleged unfair labor practices by an employer. If such evidence is not sufficient to undermine the necessity of injunction, it is difficult to imagine what evidence could possibly suffice. This is a powerful showing, and the Director is unable to rebut it.[2]

C. The Regional Director embraces (at 54) the district court's view that the injunction imposes no harm on Shamrock because it merely requires Shamrock to follow the law, likewise disregarding that the underlying conduct now subject to injunction implicates Shamrock's expression of its views, its management of the workplace (including preventing and responding to harassment, disruption, and unlawful conduct), its relations with its employees (including soliciting their complaints and asking them questions), and its legitimate business interests (including setting competitive wages and benefits). *See*

[2] The Director's principal evidence of a "slowdown" in Union support are Phipps's affidavits, *see* RD Br. at 49, but both were executed prior to the Union's charge and so do not contradict or rebut it.

Shamrock Br. at 50–51. The Director identifies no indication that the district court gave meaningful consideration to these and Shamrock's other interests, as this Court's cases required it to do. *See id.* at 23–24 (discussing cases).

D. The Regional Director has no response to Shamrock's argument that the injunction contravenes the public interest as expressed by Congress in Section 8(c), the enactment of which "manifested a congressional intent to encourage free debate on issues dividing labor and management." *Brown*, 554 U.S. at 67–68 (quotation marks omitted). The public interest "favor[s] uninhibited, robust, and wide-open debate in labor disputes." *Id.* (quotation marks omitted). It does not favor injunctions like this one, premised on protected speech, that restrict and chill employers' speech on union representation and collective bargaining.

IV. The Regional Director Does Not Even Attempt To Show That Any Live Controversy Remains Over Equitable Relief Concerning Wallace's Reinstatement

The Regional Director concedes (at 16) that Wallace released any claim to reinstatement, and even seeks to supplement the record with further evidence of that release,[3] and yet insists that injunctive relief regarding Wallace—

[3] *See* Petitioner–Appellee National Labor Relations Board's Motion To Supplement Record at 9–10, 13–14 (presenting Wallace's affidavit attesting to his release and his release and waiver of remedies). This evidence, no less than the declaration submitted by Shamrock, demonstrates the mootness of the Director's claims for relief regarding Wallace. For that reason, as well as the Court's "independent obligation to consider mootness *sua sponte*," *Shell Offshore, Inc. v. Greenpeace, Inc.*, 709 F.3d 1281, 1286 (9th Cir. 2013) (quotation marks omitted), the Director's argument (at 56 n.11) that the Court should not entertain Shamrock's mootness argument is meritless.

the very relief that Wallace has waived—is not moot. That position cannot be squared with the principle that a claim for relief becomes moot when "there is no longer a possibility that [the litigant] can obtain relief" on it. *Foster v. Carson*, 347 F.3d 742, 745 (9th Cir. 2003) (quotation marks omitted). Whatever the merits of the Regional Director's other claims for relief, and whatever the import of Shamrock's treatment of Wallace with respect to those claims, a federal court lacks jurisdiction to order prospective relief with respect to Wallace because no such remedy is possible at this point. *See Protectmarriage.com-Yes on 8 v. Bowen*, 752 F.3d 827, 834 (9th Cir. 2014).

The Regional Director's argument (at 56) that Wallace's release does not moot "the injunction" is misplaced, because Shamrock does not argue anything so broad, only that the release moots those aspects of the injunction "pertaining to Wallace," including the order that he be reinstated. Shamrock Br. at 52.

Also misplaced is the suggestion (at 53) that recognition of mootness here would undermine the general "public interest" in collective bargaining. "[T]he underlying purpose of Section 10(j) is…'to preserve the Board's remedial power while it processes the charge.'" *McDermott*, 593 F.3d at 957 (quoting *Miller*, 19 F.3d at 459–60), and here the Board no longer possesses remedial power to order relief on Wallace's behalf because he has already declined it. The Regional Director's cited authorities are not to the contrary. *Aguayo v. Tomco Carburetor Co.* held that a reinstatement order was not an abuse of discretion, not that it was permissible where that relief was no longer possible. 853

F.2d 744, 750 (9th Cir. 1988), *overruled on other grounds by Miller*, 19 F.3d 449 (9th Cir. 1994). Likewise, *Bloedorn v. Francisco Foods, Inc.*, found that reinstatement was appropriate to "preserv[e] the Board's ultimate ability to provide meaningful redress for the wrongs alleged," not that that remedy remains available where the Board lacks the ability to effect reinstatement. 276 F.3d 270, 300 (7th Cir. 2001). And *Eisenberg v. Wellington Hall Nursing Home* goes no further than *Bloedorn*. 651 F.2d 902, 906–07 (3d Cir. 1981).

In sum, neither the Board nor the courts can accord any further relief to Wallace, and the Regional Director does not contend otherwise. Accordingly, any claims for such relief are now moot.

Conclusion

The temporary injunction entered by the district court should be vacated.

Respectfully submitted,

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Certificate of Compliance

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because it contains 6,958 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Calisto MT typeface.

Dated: April 18, 2016

/s/ David B. Rivkin, Jr.
David B. Rivkin, Jr.

Certificate of Service

I hereby certify that I electronically filed the foregoing Appellant's Reply Brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on April 18, 2016. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Dated: April 18, 2016

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